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Sentence

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

4 v.

13 CR 340 (RJS)

5 STEPHEN BASCIANO,

6 Defendant.

7 -----x

8 New York, N.Y.  
9 August 29, 2014  
2:00 p.m.

10 Before:

11 HON. RICHARD J. SULLIVAN,

12 District Judge

13  
14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the  
Southern District of New York

17 REBECCA MERMELSTEIN

Assistant United States Attorney

18 JOSHUA DRATEL, ESQ.

19 Attorney for Defendant

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1 (Case called)

2 (In open court)

3 THE DEPUTY CLERK: United States v. Stephen Basciano.  
4 Counsel, please state your appearances for the record.

5 MS. MERMELSTEIN: Good afternoon, your Honor. Rebecca  
6 Mermelstein for the government.

7 THE COURT: Ms. Mermelstein, good afternoon to you.  
8 And for the defendant?

9 MR. DRATEL: Good afternoon, your Honor. Joshua  
10 Dratel for Mr. Basciano who is beside me.

11 THE COURT: Good afternoon, Mr. Dratel. Mr. Basciano,  
12 good afternoon as well. And family and friends are here. I  
13 recognize a few of them from before. Welcome. This is public  
14 so everybody is welcome here. Some of you have written me  
15 letters. It's very helpful to get letters of that sort.

16 We're here for sentencing. Mr. Basciano pled guilty  
17 before me on February 19. I want to go over with the parties  
18 what I have received in connection with sentencing and of  
19 course if I have left anything out you should let me know.

20 I have reviewed, first of all, the transcripts of the  
21 guilty plea proceeding that took place on February 19. I  
22 presided over the proceedings so I was here, but I think it's a  
23 good practice to review them before sentencing, so I've done  
24 that. I also have reviewed the presentence report that was  
25 prepared by the probation department. It's dated July 2. The

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1 report itself is 25 pages single spaced, it includes a  
2 sentencing recommendation. I have reviewed that.

3 I have reviewed the government's sentencing letter  
4 dated June 23rd, which is a six-page letter, single spaced. I  
5 have reviewed Mr. Dratel's June 25th sentencing submission. It  
6 is a 24-page, single-spaced submission and it includes assorted  
7 attachments all of which are letters from friends and family  
8 members as I mentioned before. I have reviewed a July 7 letter  
9 from Mr. Dratel which is one sentence long. It just attaches  
10 the original signed versions of letters that were included in  
11 the prior submission. So I have that. That didn't really add  
12 anything but it's good to have the signed originals. And then  
13 I have reviewed also the August 25th submission of Mr. Dratel  
14 which is a four-page, single-spaced submission that also  
15 includes a letter from Mr. Basciano which is two pages, single  
16 spaced, handwritten, very well written, I should say, for which  
17 I thank you, Mr. Basciano. You didn't have to do that, but I  
18 thank you, it was thoughtful.

19 THE DEFENDANT: Thank you.

20 THE COURT: That's what I have received in connection  
21 with sentencing. Am I missing anything?

22 MS. MERMELSTEIN: No, your Honor.

23 MR. DRATEL: No, your Honor.

24 THE COURT: Let's start with the presentence report.  
25 Mr. Dratel, you received a copy of the presentence report?

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1 MR. DRATEL: Yes, your Honor.

2 THE COURT: Have you reviewed it with your client?

3 MR. DRATEL: Yes.

4 THE COURT: Do you have any objections to it?

5 MR. DRATEL: We stated some objections in our letter  
6 and the final report incorporates some changes. I don't know  
7 if they change any procedural aspects with respect to guideline  
8 levels except with respect to 2D1.1 which was prior to the  
9 Sentencing Commission's decision on retroactivity. According  
10 to the report it doesn't address the 2D1.1.

11 THE COURT: I'm not sure the Probation Department's  
12 position is going to change or has changed as a result of the  
13 retroactivity. The Sentencing Commission has recommended  
14 certain amendments. They've also voted to make those  
15 amendments apply retroactively. Neither goes into effect  
16 unless and until Congress acts through inactivity. It's sort  
17 of a perverse thing. Congress has between now and November to  
18 decide whether to take steps to affirmatively reject the  
19 proposals. If they do nothing, then the amendments go into  
20 effect and that would result in a two-level reduction.

21 The United States Attorney's Office has typically  
22 taken the position that the two levels should apply now, that  
23 he shouldn't have to wait, unless there are certain aggravating  
24 circumstances and in the sentencings of other defendants in  
25 this case the government has taken the view that the two-level

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1 reduction shouldn't be applied because the defendants have ties  
2 to organized crime. I think the government no longer has that  
3 position. In light of the retroactivity, in light of some  
4 additional discussions within the Department of Justice they  
5 are no longer taking that position. They are now consistently  
6 across the board taking the position that the drug guidelines  
7 should be reduced by two levels.

8 Is that accurate here, Ms. Mermelstein?

9 MS. MERMELSTEIN: That's correct, your Honor, I put in  
10 my submission before the government changed its position but  
11 you're exactly right.

12 THE COURT: I'm getting ahead of myself here, I  
13 suppose. My only view is, frankly, we should wait for  
14 amendments to go into effect before we apply them, but because  
15 many judges including myself in other cases have applied the  
16 lower guidelines in anticipation of the amendment, I don't  
17 think there's any reason to not do the same here. So I'm going  
18 to apply the two-level reduction. So that I think is off the  
19 table. The other objections that you had were with respect to  
20 characterizations of facts in prior arrests that you dispute.  
21 Probation stands behind the facts that they had. I don't think  
22 it's going to affect the sentencing at all. We could perhaps  
23 talk about that as well. I'm allowed to consider facts that  
24 took place even if they weren't proven in other cases, proven  
25 beyond a reasonable doubt, but it may be that I would have to

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1 make a factual finding that they were established by a  
2 preponderance of the evidence, if I apply that here. I don't  
3 think we have to do that here but we'll cross that bridge when  
4 we come to it. Other than that, you have no objections?

5 MR. DRATEL: No, your Honor.

6 THE COURT: Ms. Mermelstein, you reviewed the report.  
7 Do you have any objections?

8 MS. MERMELSTEIN: No, your Honor.

9 THE COURT: Okay. All right. So that's the  
10 presentence report. Mr. Basciano, when you pled guilty I told  
11 you there were different factors that the judge had to take  
12 into account in deciding sentence. Do you recall that?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: One of the factors I mentioned was the  
15 United States sentencing guidelines that we spoke about a  
16 little bit today. Remember this big book?

17 THE DEFENDANT: Yes.

18 THE COURT: I think I pointed that out to you and you  
19 and some of the others who were there on that day remember that  
20 this is a book that some judges and lawyers and academicians  
21 put together and what it does is provide guidance to judges  
22 like me. Judges are to look at this book, go to pages that  
23 apply, make findings of facts and certain conclusions based on  
24 that. For every crime and type of crime there's a chapter in  
25 this book. So the judge is required to go to that chapter. So

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1 in this case which relates to a narcotics offense the judge is  
2 required to go to Section 2D1.1 in this manual and make  
3 findings including the type of drug involved, amount of drug  
4 involved, those sorts of things. The judge has to look up  
5 certain things that relate to role in the offense and some  
6 other things and through that process of addition and  
7 subtraction the judge comes up with a number and that number is  
8 known as the offense level. The judge then goes to another  
9 chapter in the book that relates to criminal history and for  
10 that chapter the judge is asked to consider whether the  
11 defendant has prior convictions, if so, did it result in jail  
12 sentences, if so, what were those sentences and depending on  
13 the answers to those questions the judge assigns points and  
14 comes up with another number, that number being referred to as  
15 the criminal history category. There are six categories.  
16 Category I is the lowest, category IV is the highest and most  
17 serious. The judge is then told to take those two numbers, the  
18 offense level on the one hand, the criminal history category on  
19 the other, and go in the back of in book where there's a table  
20 or rating and the judge goes down this table to the far left,  
21 offense level, stops at the one appropriate. The judge goes  
22 across the other columns to the right, stops at the column  
23 that's appropriate for criminal history category and what the  
24 judge finds is the range that the commission recommends.

25 I don't have to follow this. I do have to consider

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1 it. I have to make my findings according to the book and state  
2 what the range is but there are other factors I have to  
3 consider as well. So we're going to spend a few minutes  
4 talking about this book and how it applies in this case. Once  
5 I do that, state the range, then we'll talk about the other  
6 factors.

7 I apologize for the acoustics. We have some new  
8 microphones. It's a beautiful courtroom. The acoustics are  
9 challenging, so we have new microphones. They were designed to  
10 enhance the ability to be heard. They're working okay, but  
11 every once in a while we get some feedback which kinds of makes  
12 you feel like a dog hearing a whistle, so it's irritating, but  
13 we'll deal with that as we go.

14 So for the sentencing guidelines the presentence  
15 report sets forth the views of the probation office beginning  
16 on the very bottom of page 9, but for the most part on page 10  
17 through page 12. The base offense level based on the amount  
18 and type of drugs, which is marijuana, at least 80 kilograms,  
19 not more than 100 kilograms, is level 24. Now, I recall  
20 certainly at the time of the guilty plea there was some dispute  
21 as to what the amount of marijuana was. Mr. Basciano at least  
22 initially thought it was less than a hundred kilos but wasn't  
23 really sure, so I just want to be sure everyone is on board  
24 that this is the quantity, 80 to 100 kilograms?

25 MR. DRATEL: Yes.



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1 THE COURT: And the government is?

2 MS. MERMELSTEIN: Yes, your Honor.

3 THE COURT: So I have no reason to dispute that so I  
4 will adopt that finding. Level 24 is the base offense level.

5 Mr. Basciano, there's no enhancements. There's a  
6 three-level reduction because you accepted responsibility and  
7 accepted, pled guilty well in advance of trial so pursuant to  
8 Section 3E1.1 a three-level reduction is appropriate. That  
9 puts him at level 21. Mr. Basciano is in criminal history  
10 category III. He has three prior convictions; one for assault,  
11 two for aggravated unlicensed operation of a motor vehicle. I  
12 guess he was also on parole at the time of this offense, so  
13 that results in a total of six criminal history points,  
14 criminal history category III. So offense level 21, criminal  
15 history category III puts the range at 46 to 57 which is what  
16 the probation department found.

17 By virtue of the amendment that has not yet taken  
18 place, not gone into effect yet but is likely to, in which the  
19 government and the defense lawyers and other lawyers assume to  
20 be going through, I'm going to reduce by another two levels the  
21 offense level. So that puts us at level 19, criminal history  
22 category III, which is a guidelines range of 37 to 46 months.  
23 It's an odd number. That's three years and one month up to  
24 three years and eight months. So that's the range. I think  
25 somebody in the submission had suggested that it was 36 months

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1 at the bottom end, but it says 37.

2 MR. DRATEL: 37.

3 THE COURT: 37. Okay. So that's my finding with  
4 respect to the sentencing guidelines. Does anybody object to  
5 what I just said?

6 MR. DRATEL: No, your Honor.

7 MS. MERMELSTEIN: No.

8 THE COURT: Okay. So, as I said, there's no magic to  
9 the guidelines. That's one thing you think about. Do you need  
10 a minute?

11 MR. DRATEL: Just one second, your Honor.

12 (Pause)

13 MR. DRATEL: Thank you, your Honor.

14 THE COURT: Okay. So there are other factors,  
15 Mr. Basciano, that I mentioned to you before you pled guilty  
16 and these are factors that a Court has to consider along with  
17 the guidelines in fashioning sentence. Those factors include  
18 your own personal history, the facts and circumstances of your  
19 life and your birth to the present, which like everybody's life  
20 is complicated. There are a lot of different things that have  
21 gone on in your life and they're all relevant to figuring out  
22 what's the appropriate sentence. I have to tailor the sentence  
23 here to you as a person and that means considering the  
24 circumstances of your birth, your early childhood, your  
25 educational background, your work history, your criminal

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1 history to be sure. Other factors like family circumstances  
2 today. So I will consider all those things, naturally.

3 I also have to consider the facts and circumstances of  
4 this crime. This is a serious crime, obviously. And the  
5 sentence that I impose has to reflect the seriousness of the  
6 crime. It has to be a just punishment for the crime. And that  
7 means not just what the crime is called but what the crime  
8 entailed, what you did, what others did, for how long a period  
9 of time, for what kind of money, with what kind of effect.  
10 Those are all relevant factors to be considered in fashioning,  
11 in tailoring the sentence. The sentence is designed to promote  
12 respect for the law and that requires a balancing. Other  
13 factors that I'm required to consider include the need to deter  
14 or discourage you and others from committing crimes in the  
15 future, the hope being that by imposing a sentence on you I'll  
16 send a message to you and perhaps to other people who might be  
17 considering engaging in criminal conduct in the future and  
18 hopefully on the basis of this sentence they'll say, oh, it's  
19 not worth it, forget it and at the end of the day there will be  
20 less crime than there would have been had I sentenced you to a  
21 lower sentence. Hard to know with any precision whether that's  
22 true, but that's the thinking and I think most of us know  
23 there's something to it. So that's a factor I have to take  
24 into account.

25 I also have to consider your own needs while you're in

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1 custody. People with medical conditions, mental health  
2 conditions, substance abuse treatment needs, all of those  
3 things have to be considered by the judge in fashioning a  
4 sentence. And then I guess the last factor that I'm required  
5 to consider and will consider is the need to avoid what's  
6 referred to as unwarranted disparity between the sentence in  
7 this case and other similar cases for a similar offense and the  
8 point is it would be wrong and probably would encourage less  
9 respect for the law if the sentence imposed here was wildly out  
10 of whack with sentences imposed on other defendants in cases  
11 that are similar to this one with histories that are similar to  
12 the defendant here. It's important that there be some rough  
13 equality across the system so that the system is perceived as  
14 unbiased, so I'll consider that. The hard part is balancing  
15 all these factors and that's my job in a nutshell.

16 What I'm going to do is hear from the lawyers. I'll  
17 start with Mr. Dratel. He's made a variety of points in his  
18 submission which was very lengthy, very characteristic of him.  
19 So I'll hear from Mr. Dratel on those and other points he  
20 wishes to make.

21 I'll hear from Ms. Mermelstein. I'll let her respond  
22 and make other points she thinks are relevant. After that I'll  
23 give you the opportunity to speak, if you'd like. You have the  
24 opportunity to speak. You've already written me a letter. You  
25 shouldn't feel you have to speak but if you'd like to you're

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1 very welcome to and after that I will then tell you the  
2 sentence I will impose and my reasons for it. So, Mr. Dratel?

3 MR. DRATEL: Thank you, your Honor. And I won't go  
4 through all of the points that are in the submissions. I know  
5 the Court has read them and is considering them. The Court's  
6 initial remarks obviate the need for me to talk about the  
7 amendments. I'd like to speak about the letters from some of  
8 the people who are here, some people who are not here, but  
9 obviously it's a show of support for Mr. Basciano in terms of  
10 what the future holds for him in the sense of someone who when  
11 he does emerge from jail will have a support mechanism that  
12 obviously cares about him, cares about his future and from his  
13 letter the Court knows his family's view of the situation he's  
14 in, what got him here and where he will be once this is  
15 finished. So I think that's important in the context of  
16 projecting into the future for particular defendants as to what  
17 their current sentence is going to mean once it's expired. I  
18 think Mr. Basciano's letter is very important, obviously in the  
19 context of where he sees himself now, where he sees the conduct  
20 that put him here and where he says himself in the future. So  
21 much of this process in a certain sense, bears repetition, in  
22 case after case it's choreographed in a sense, but his letter  
23 is not. It's his own, generated by him and him alone and it  
24 reflects his sincere position on where he's at and where he was  
25 at the time of his arrest.

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1 I want to talk a little bit about criminal history  
2 because we talked about it a little bit in the papers but I  
3 want to expand on it in this sense in that a couple of mistakes  
4 that Mr. Basciano has made in the past and for which he has  
5 paid for with jail time continue to exert a significant impact  
6 on where he is in the guidelines in this case. And I think at  
7 some point that's been taken into account so it doesn't  
8 continually again and again result in punishment for something  
9 that he's already served a prison sentence for and something  
10 that just, there's no escape from, but at the same time I think  
11 it has to be factored in also particularly the kind of offense,  
12 the driving without a license, the 30-day sentence that puts  
13 him in category 3. I think the parole issue is also a  
14 technical one because it really relates to the length of the  
15 indictment going back to 2009.

16 THE COURT: I'm not sure that's what puts him in  
17 category III. In category III, he has three levels because of  
18 the assault and that's a pretty serious crime. He did some  
19 jail time for that one.

20 MR. DRATEL: Yes.

21 THE COURT: He got two more points because he was on  
22 parole at the time he was involved in this criminal activity,  
23 so even without the driving offense he's in, he's got five  
24 criminal history points which puts him in category III.

25 MR. DRATEL: But I think the parole one is a technical

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1 issue as well because even though the conspiracy starts in  
2 2009, the plea agreement -- because the presentence report went  
3 by the indictment which alleges from 2009 but the plea  
4 agreement discusses his participation from 2012 on and he's off  
5 supervision in 2011. So I think that's a technical issue which  
6 is one that again ameliorates or mitigates the criminal history  
7 category which is a technical matter either way.

8 THE COURT: I'm not sure of the facts then. Paragraph  
9 26 of the presentence report talks about, "Stephen Basciano  
10 started Vincent Basciano's, Jr.'s marijuana route and sold the  
11 route to Vincent Basciano, Jr. while he was in jail in  
12 connection with a 2007 conviction for assault. Vincent  
13 Basciano, Jr. started operating the route in at least 2009 and  
14 paid Stephen Basciano a portion of the proceeds from the route.  
15 After Stephen Basciano got out of jail in 2009 he started  
16 selling marijuana a pound at a time to other customers. He  
17 purchased marijuana from Larca that Larca obtained from the  
18 marijuana shipments arranged by others." So according to  
19 paragraph 26 the activity doesn't begin in 2012, it begins in  
20 2009.

21 MR. DRATEL: Right. That's what the indictment  
22 charges, your Honor.

23 THE COURT: So I don't know it's technical. I'm not  
24 sure I'm following the point you're making.

25 MR. DRATEL: Just that his plea was between, started

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1 in 2012 to 2014. That's all -- I mean, 2013. I'm sorry. So  
2 it's just, it gets into category III regardless, but it's just  
3 an overlap that's not quite consistent in terms of the  
4 allegations. But I still think that even still that it's  
5 unusual with someone with a single felony to be in category  
6 III.

7 THE COURT: Well, if you commit the crime while you're  
8 on probation it's not unusual. The instant crime. I mean, I  
9 don't know. I guess it seems to me if you went to jail you get  
10 your three points, you commit another crime shortly after you  
11 get out while on probation you'll be in category III by  
12 definition. I don't think there's anything unusual about that.  
13 I know the guidelines didn't contemplate exactly this kind of  
14 scenario.

15 MR. DRATEL: Another factor also is the sentencing in  
16 terms of the 3553(a)(6), which is the disparity issue, the  
17 Court I think in this case has for some of the defendants has  
18 for the sentencings gone below the guidelines. Certainly the  
19 predominant trend in this district is below the guidelines for  
20 sentences generally and nationally for drug cases below the  
21 guidelines as well. And putting all those statistics -- so I  
22 think a sentence below the guidelines is really more the norm  
23 by a large margin now particularly in a case like this than a  
24 guideline sentence.

25 THE COURT: You had something about that in your



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1 letter. You certainly didn't carve out cooperation, so I think  
2 it's apples and oranges. It should be for non-cooperating  
3 cases what percentage fall within or outside the guidelines.

4 MR. DRATEL: For the vast majority, if you carve them  
5 out entirely it's still probably, in this district, 55 percent  
6 of all sentences. I'm trying to do the math right now. If you  
7 take out the 55 all together then you're talking about 80,  
8 talking about 85 percent of the cases, about 5/8ths, so you're  
9 looking at more than 60 percent would be below the guidelines  
10 still even if you carved out the 15 percent cooperator cases.

11 THE COURT: Well, there's a high percentage of them  
12 below the guidelines. I think we can agree on that.

13 MR. DRATEL: Yes.

14 THE COURT: All right. But in every case it should be  
15 a fact intensive and very specific inquiry about the conduct.  
16 So the other defendants who have been sentenced who were part  
17 of this conspiracy, there are some of them doing a lot of time.  
18 Might be a little below the guidelines, but 108 months, nine  
19 years, nine and a half years, eight and a half years.

20 MR. DRATEL: But some a lot less, your Honor. So I  
21 think there's a --

22 THE COURT: Generally that's a function I think of  
23 quantity and the amount of time in the conspiracy. Joseph  
24 Basciano got a lower sentence, clearly, so did Dominick  
25 Ballucia.

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1 MR. DRATEL: And Mr. Kokenyei also, I think he got a  
2 sentence below the guidelines certainly. I think his sentence  
3 was three years but I think that was considerably below his  
4 guidelines.

5 THE COURT: So, all right, but the mere fact of below  
6 the guidelines is less informative or instructive than what  
7 those folks did in this conspiracy relative to what  
8 Mr. Basciano did in the conspiracy.

9 MR. DRATEL: Well, Mr. Kokenyei was one grade higher  
10 in terms of the connection to the source. He was the person  
11 with the connection to California, I believe, so in this sense  
12 Mr. Basciano is one level below that in terms of a retail  
13 operation in that regard.

14 THE COURT: Well, I'm not sure being closer to the  
15 source is necessarily indicative of greater culpability. I  
16 always view it as sort of a horizontal chain as opposed to a  
17 vertical one, that every link is important and without a link  
18 the chain breaks. But I don't mean, is that undisputed that  
19 Mr. Kokenyei was closer to the source than Mr. Basciano,  
20 Ms. Mermelstein?

21 MS. MERMELSTEIN: I suppose it depends on what you  
22 mean by closer to the source. Kokenyei traveled to California  
23 in connection with the conspiracy which this defendant didn't  
24 do.

25 THE COURT: But that's basically all the defendant

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1 did.

2 MS. MERMELSTEIN: Right, so he's a sort of middleman  
3 in the chain.

4 THE COURT: But for a very limited duration.

5 MS. MERMELSTEIN: For a shorter period of time. So I  
6 think your Honor's point is right -- I think it's probably a  
7 fair characterization to say he's closer to the source. I'm  
8 just not sure that's a useful data point in terms of  
9 culpability.

10 THE COURT: Anyway, I'm sorry to interrupt, Mr.  
11 Dratel. Go ahead.

12 MR. DRATEL: To a certain extent all sentences are  
13 apples and oranges because there are too many variables to  
14 compare the entirety of one person to another. But I think the  
15 balance of everything here would militate for a sentence well  
16 below the guideline that the Court has found and for all the  
17 reasons that we've talked about I again, I know the Court has  
18 looked at the papers, and I don't want to repeat them all but  
19 there are these issues of -- also the time spent at MCC which  
20 has been difficult for Mr. Basciano. It's one of the reasons  
21 he wants to be sentenced now because he wants to be somewhere  
22 else other than MCC, because it's a rather difficult  
23 proposition for him to be on the floor he's on because it's  
24 replete with violence and just in terms of hygiene resources  
25 and even ordinary resources that when one is in a prison one is

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1 supposed to have available.

2 Again, I know the Court has gone through this. I  
3 think in the context of the entirety of the case where the  
4 Court has sentenced people and where Mr. Basciano is and also  
5 taking into account very much also his letter which again, I  
6 think, is something that it's compelling in a -- I'm sorry, I'm  
7 getting some feedback here, maybe if I move it this way a  
8 little bit.

9 THE COURT: Maybe.

10 MR. DRATEL: It's compelling in the sense of where he  
11 sits now in his own mind and his acknowledgment of his  
12 mistakes, his recognition of what that means for himself, his  
13 family, his future, and where that puts him going forward. I  
14 think that's a watershed event for someone and I think that it  
15 demonstrates, again, the unnecessary, that a longer sentence is  
16 unnecessary. A guideline sentence or a sentence at or near the  
17 guidelines level is unnecessary in this case, that a below  
18 guidelines sentence is sufficient but not greater than  
19 necessary. Those are the factors, your Honor.

20 THE COURT: Thank you. Mr. Mermelstein, anything you  
21 want to add or say in response to what Mr. Dratel just said?

22 MS. MERMELSTEIN: I don't have a lot. I think the  
23 government has put forth its submissions and your Honor made  
24 some of the points that I would respond to Mr. Dratel with,  
25 which is to say, unlike the unlicensed operation of the motor

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1 vehicle which I think we would say is not a very serious crime,  
2 that is not what puts the defendant into category III, that's  
3 not why he's in that category, and I think it is proper that he  
4 is in this category. And it's very significant that he is in  
5 this category. It's hard to see this arrest as a watershed  
6 moment in this defendant's life because he's already served two  
7 years in prison on his first arrest. You would think that --  
8 that's a relatively long prison term, certainly for a state  
9 conviction, first offender, pretty serious prison term, and  
10 that in no way deterred his criminal conduct. He started this  
11 marijuana conspiracy before that conviction and continued when  
12 he got out of jail, while on parole, while under the  
13 supervision of the court and continued to engage in that  
14 criminal conduct and I think that's a basis to say two years  
15 did not deter this defendant. So some serious sentence is  
16 appropriate here. I think here the guidelines accomplish that.  
17 To say that statistically speaking many defendants get below  
18 guideline sentences, it can't be that as a result then for  
19 equitable reasons no one should get a guideline sentence and I  
20 think it depends so much on the facts of a particular case and  
21 the facts here are disconcerting. I think the phone calls  
22 cited in the government's submission are also disconcerting.  
23 Mr. Dratel reads them a different way as being a renunciation  
24 of the prior possession of firearms and the prior willingness  
25 to engage in violence, but, frankly, even if they're read that

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Sentence

1 way I think there are clearly firearms possessions by this  
2 defendant for which he was never arrested and never convicted  
3 and he purports to have shot at people, conduct which luckily  
4 doesn't appear to have ultimately resulted in someone being hit  
5 but is ultimately pretty dangerous with serious disregard for  
6 the law. So I think given the long-standing participation in  
7 the offense, serious nature of the offense, his participation  
8 before and after a very significant arrest I think a very  
9 significant sentence is necessary and appropriate here. I  
10 think the guidelines accomplish that purpose.

11 THE COURT: Okay. Thank you. Do you want to respond,  
12 Mr. Dratel?

13 MR. DRATEL: Yes. One is that the assault occurred  
14 when Mr. Basciano was 21. He is now 30. I think his letter to  
15 the Court reflects a maturation process that was not present at  
16 the time he was 21 or even when he got out of prison at that  
17 point. Although he did mature significantly in that respect  
18 because what those conversations that Ms. Mermelstein refers to  
19 demonstrate is the change in his point of view about firearms  
20 after getting out of jail. He specifically says more than once  
21 on that tape and I've listened to them in their entirety very  
22 recently. He says it more than once, I thought that way before  
23 I went to jail and it was wrong. And he has changed and now,  
24 obviously, he's got another arrest, not involving firearms or  
25 anything to do with that, something else, but there's further

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Sentence

1 change. And the question is how much more jail time is  
2 required to get to the next level of maturation. I think time  
3 in and of itself has done that to a certain extent. This is  
4 his first time, obviously, in federal court, which I think is  
5 significantly different in the context of people's  
6 understanding of consequences for their acts and what the  
7 possibilities are for future wrongdoing and how that affects  
8 someone, and I think all of that is important in figuring out  
9 what the appropriate sentence is, and I think that it has to be  
10 calibrated. The question of statistics is not one of purely  
11 statistical analysis but it's about where the norm lies in the  
12 context of sentencing these days, in the sense that we existed  
13 for a significant period where the norm was the guidelines.  
14 Now the norm is not the guidelines. The norm is under the  
15 guidelines. And so I think that we have to acknowledge that  
16 and that a sentence should reflect that in the context of  
17 thinking about disparity, thinking about sentencing and  
18 thinking about sufficient but not greater than necessary.  
19 Thank you, your Honor.

20 THE COURT: Thank you. All right, Mr. Basciano I said  
21 you have a right to address the Court. You don't have to --

22 THE DEFENDANT: I would like to. Just a few short  
23 words. Since I've been in MCC I've had time to think. All my  
24 friends, vacations, everything they're doing I'm missing from  
25 selling marijuana. I just want to let you know that this will

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Sentence

1 never happen again. I learned my lesson. Just from seeing  
2 everything I'm missing I'll never risk my freedom again.  
3 That's all I want to say.

4 THE COURT: All right. I'd like to take maybe five  
5 minutes to just think about what has been said today, collect  
6 my thoughts and then I'm going to come back and at that time  
7 I'll recite the sentence I intend to impose and explain my  
8 reasons and then go forward with sentencing. So about five  
9 minutes, if it's all right with you. Thanks.

10 (Recess)

11 THE COURT: All right. Sentencing is a hard thing and  
12 I spend a lot of time on it, and it's important to be  
13 consistent and it's important to be thoughtful in how sentence  
14 is arrived at. And so one of the hallmarks in our system,  
15 Mr. Basciano, is that judges have to give reasons and I think  
16 that's a good thing. I think it's helpful that the defendant,  
17 the defendant's family, the public never has to wonder what was  
18 going through the judge's mind. That it's all public, that the  
19 judge has an obligation to explain it. That's what I tend to  
20 do at these sentencings. Sometimes it feels like I'm giving a  
21 lecture, but it's not that, and it's certainly not a desire to  
22 wag my finger at anybody. It's just to explain what goes into  
23 a sentence of this kind. You're a human being with people who  
24 care about you, good qualities, and your letter shows a  
25 thoughtful person who has real talents and I think real



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Sentence

1 potential. I believe that.

2           There are, of course, other aspects to the sentencing  
3 that also have to be considered and that's the crime itself,  
4 the notion of just punishment, the effect it may have on future  
5 behavior and general deterrence. So these are the things that  
6 sort of come to mind in this case. I see this as being --  
7 marijuana I guess is a subject about which we're having a  
8 national conversation I suppose but this is not a case that  
9 involved medicinal marijuana or marriage being used for any  
10 other purpose other than for people getting high illegally and  
11 it was being done not for motives involving glaucoma but money,  
12 it was all done in an illicit drug trade just to get money  
13 through illegal means. That's what it was. In this case it  
14 went on for a very long time. It wasn't a one-shot thing.

15           We talked about Mr. Kokenyei who I gave 36 months to.  
16 Mr. Kokenyei's role was to introduce people, to help a supplier  
17 get together with somebody who wanted a supply but other than  
18 an introduction it was in passing. In this case according to  
19 what's in the presentence report, your role was much more  
20 active. It began before you were in prison, it paused while  
21 you were in prison and began again when you got out. It was  
22 something you did consistently. It wasn't a one-shot, and I  
23 think that that in terms of culpability that does make you more  
24 culpable than some of the other defendants in this case. Your  
25 brother, Joseph, got a much lighter sentence than anybody

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Sentence

1 because it seemed to me that he was involved in a much less  
2 serious way, almost as an afterthought and almost completely as  
3 a result of who he was and who he was related to, and my sense  
4 is that he sort of had been with a different family or been  
5 living in a different place he would have bypassed this  
6 altogether and I think the sentence has to reflect that. But  
7 you, according to what's in the presentence report, were a lot  
8 more active in this thing and I think that goes to culpability.

9           Valentine was another person I sentenced. I mean, he  
10 seemed more like you in the sense that he had a route, he was  
11 responsible for distributing marijuana in this area from loafs  
12 that he received from California. I gave him 72 months to  
13 reflect the fact that he had priors and reflect the fact that  
14 what he was doing was pretty serious and over a long period of  
15 time. There's no magic to these guidelines. They're largely  
16 carried by the amounts of drugs involved. They're criticized  
17 for overly focusing on the amount and I think that's fair, but  
18 I think the quantity often reflects culpability. Larger  
19 amounts of drugs usually makes you more culpable than a smaller  
20 amount of drugs but other functions, other factors, the role in  
21 the offense, not leadership versus minor participant, but just  
22 driver versus distributor versus introducer, I think those are  
23 the types of things that really aren't considered in the  
24 guidelines.

25           Duration in the offense is not really taken into

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Sentence

1 account by the guidelines. Seems to me a person who was  
2 involved for a very short period of time is less culpable  
3 generally than a person who was involved for a long period of  
4 time even though the amount is the same. So in your case I  
5 think it's the duration, it's the nature of the activity, the  
6 fact that you were involved before and after a serious term of  
7 imprisonment, that you should have recognized what you appear  
8 to recognize now. I think you should have recognized that at  
9 the time you were getting out of jail in your previous term so  
10 all of that persuades me a sentence below or even at the bottom  
11 end of the range isn't appropriate.

12 I think a sentence in this case of three and a half  
13 years is right. I'm not married to these guidelines. I use  
14 the guidelines for guidance, but ultimately I trust in my  
15 judgment and my judgment in this is that a three-and-a-half  
16 year term is appropriate particularly since you already served  
17 a two year term and it didn't seem to do the trick.

18 It's not to detract from what I said before. I think  
19 you're a decent guy. There's a future for you, but there has  
20 to be just punishment. That's one of the factors I have to  
21 consider. So all things considered I think a sentence of 42  
22 months is an appropriate sentence. That's three-and-a-half  
23 years, as I said. I also will impose a term of supervised  
24 release of three years. I'm not going to impose a fine.  
25 Forfeiture has been agreed to I think by the parties, is that

E8TFBASS

Sentence

1 right, \$600,000?

2 MS. MERMELSTEIN: That's right, your Honor.

3 THE COURT: And, Mr. Dratel, you had asked me to order  
4 that the garnishment be the lowest possible. I usually leave  
5 that up to probation. Usually I think it's 15 percent from the  
6 gross income is the maximum they take out. I think it  
7 determines in large part whether and how much money  
8 Mr. Basciano will be making in legitimate employment when he  
9 gets out. So did you have something else in mind?

10 MR. DRATEL: Just to direct probation to not take the  
11 maximum amount. I mean, it's an extraordinarily onerous  
12 penalty.

13 THE COURT: It can be. It sort of depends on how much  
14 income a person has coming in. So let's leave it as this: If  
15 when Mr. Basciano gets out the forfeiture payments are  
16 perceived as high I'm certainly willing to revisit that. So  
17 you can take it up with probation in the first instance to say  
18 it could be lower and if they disagree you can send me a letter  
19 and I'll reconsider. I'm not looking to bury or handicap  
20 Mr. Basciano because he's looking to get his life back  
21 together. No one would do that. I think people may disagree  
22 on what's the appropriate amount and ultimately I get to make  
23 those decisions. So I will hear you, but I think really at  
24 this point I'm ordering forfeiture in the amount of \$600,000.

25 I'm not going to impose a fine, as I said. I will

E8TFBASS

Sentence

1 order a special assessment of \$100 and ask you to pay  
2 immediately, Mr. Basciano and that's designed to help defray  
3 the costs of prosecution, the court costs. One hundred dollars  
4 is not a whole lot. That's a mandatory special assessment.

5 Is there any legal impediment to my imposing such a  
6 sentence?

7 MS. MERMELSTEIN: No, your Honor.

8 MR. DRATEL: No, your Honor.

9 THE COURT: Mr. Basciano, could I ask you to please  
10 stand? Mr. Basciano, having accepted your guilty plea back in  
11 February, I now sentence you as follows: I sentence you to a  
12 term of incarceration of three-and-a-half years, 42 months,  
13 with credit for the time you already served. I will also  
14 impose a term of supervised release of three years and will  
15 include the following mandatory special conditions: First, you  
16 shouldn't commit another federal, state or local crime of any  
17 kind. You shall not possess illegal narcotics or use illegal  
18 narcotics of any kind. That includes prescription drugs for  
19 which you don't have a prescription. You may not possess a  
20 firearm or destructive device of any kind. If you are near a  
21 gun, you've got to get out of town. You've got to get far  
22 away. You can't possess a gun, period. If you do it's a crime  
23 and you'll be looking at serious penalties, but also it will be  
24 a violation of your supervised release in this case and you  
25 will be subject to being resentenced here for up to three years

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Sentence

1 for the violation of your supervised release. I tell you that  
2 just because I really want to press on you that you can't be  
3 near guns at all. I think you get that message.

4 You will be tested for drugs twice, at least twice;  
5 once when you get out and shortly after that as the probation  
6 department thinks appropriate. So that will be part of your  
7 supervised release. You will also cooperate in the collection  
8 of DNA as directed by the probation officer.

9 There are 13 standard conditions. They apply to  
10 virtually every case involving supervised release. I will  
11 apply those here. In addition, there are special conditions I  
12 want to impose. They include, first of all, that you will  
13 provide probation with access to any requested financial  
14 information. You will not incur new credit charges or open  
15 additional lines of credit without the approval of the  
16 probation officer. This is to insure you are not getting over  
17 your head financially which would put you in a situation where  
18 you would be tempted to make bad decisions that could put you  
19 back into trouble. That's the reason for those conditions.

20 In addition to that you will also submit your person,  
21 your residence, place of business, your vehicle or any other  
22 premises that you control, they will be subject to a search in  
23 the event the probation officer believes there's some evidence  
24 of a crime or evidence of a violation of supervised release.  
25 That search will have to be done in a reasonable way at a

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Sentence

1 reasonable time, but you will not have the ability to just say,  
2 "No, thanks, I don't want to do this." If you refuse or  
3 otherwise obstruct the search that would be a violation of your  
4 supervised release. One other thing I want to be sure you  
5 understand, to the extent that you share premises with someone,  
6 you have a girlfriend who obviously you're planning a future  
7 with, you have to let her know her things as well will be  
8 subject to a search merely due to the fact that she's living  
9 with you and sharing a premises with you. So you have to let  
10 her or anyone else with whom you share a premises, you have to  
11 let them know that.

12           You will be supervised in the office of your  
13 residence. You're planning to live in the Southern District, I  
14 think, right here in the Bronx or nearby, so you'll be  
15 supervised in this district. I'm going to ask you to report to  
16 the nearest probation office within 24 hours from your release  
17 of custody. So the day you come out you'll come home,  
18 celebrate. That will be a nice day. It will be a happy day.  
19 But the very next day I want you to go to probation to get your  
20 supervision lined up unless the next day is a holiday or a  
21 weekend, then on the next business day. Okay? All right. As  
22 I said, I'm not going to impose a fine. I will order  
23 forfeiture in the amount of \$600,000 pursuant to the agreement  
24 of the parties and I will order the \$100 special assessment.  
25 Now, are there open counts?

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Sentence

1 MS. MERMELSTEIN: There's an underlying indictment  
2 which the government moves to dismiss.

3 THE COURT: So I dismiss the open counts of the  
4 underlying indictment.

5 I should tell you, Mr. Basciano, you have the right to  
6 appeal this sentence to the extent you haven't already waived  
7 that right. I think you may have. I think the way that the  
8 agreement you entered into with the government was lined up it  
9 says that if I sentenced you to 57 months or anything less than  
10 57 months you agreed you won't appeal the sentence. Since I  
11 gave you 42 months I think you probably waived your right to  
12 appeal. But if you think you have a basis to appeal, talk to  
13 Mr. Dratel. You should file a notice of appeal within two  
14 weeks. Those deadlines are pretty strict so make sure you get  
15 those in on time within two weeks. Okay? Mr. Dratel, are  
16 there any recommendations you'd like me to make to Bureau of  
17 Prisons?

18 MR. DRATEL: Yes, your Honor, that Mr. Basciano be  
19 located to a facility as close as possible to New York and the  
20 Court recommend that he be enrolled in the BOP's substance  
21 abuse program.

22 THE COURT: I notice that in your letter now that you  
23 raise it but it seemed to me in the presentence report it  
24 sounded to me as if there really wasn't a drug problem here.

25 MR. DRATEL: I think there's marijuana use and --



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Sentence

1 THE COURT: It didn't seem that there was anything  
2 other than that. So what I'm referring to is paragraph 79. It  
3 says, "Defendant initially smoked marijuana at age 20 with  
4 friends. He used it a total of approximately ten times. He  
5 ceased smoking marijuana in 2011. The defendant disclaimed the  
6 use of any other type of illicit drugs or prescription  
7 medications. Began consuming alcohol at 21. Drank once or  
8 twice a month but not to excess." So it doesn't seem to me  
9 that there was any basis to think that there was a drug problem  
10 here. Is there more to the story that I'm missing?

11 MR. DRATEL: No, your Honor, I just think that my  
12 experience is that the use of illegal substances, it qualifies  
13 the defendant for enrollment in these programs.

14 THE COURT: Well, look, to the extent he qualifies,  
15 that's certainly something the Bureau of Prisons can consider.  
16 I'm not going to recommend one way or the other. Usually I  
17 make a recommendation in the case where someone has a  
18 demonstrated abuse problem. I don't see that here. In fact,  
19 almost to the contrary, so I will respectfully decline to make  
20 that recommendation. But I will recommend that he serve his  
21 time in a facility near to his family as possible. I can't  
22 order that, but generally the Bureau of Prisons tries to  
23 accommodate those recommendations, so I will recommend it in  
24 the strongest terms. This is a tough day for the defendant,  
25 for the family. I get that. I think Mr. Basciano is a person

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Sentence

1 who seems to have learned his lesson. His letter reflects  
2 that. So my hope is that, Mr. Basciano, that never again will  
3 you be in a courtroom and the rest of your life is spent making  
4 up to your family and yourself -- you don't deserve this. This  
5 is no way to live. You should be out there living a life that  
6 you and others can be proud of. That's my hope for you. When  
7 you get out you will be supervised by a probation officer and  
8 the probation officer is hoping for the best for you, as we all  
9 are. So let him provide that. Probation can be helpful. They  
10 can help with job placement, with training opportunities.  
11 Those are all things that you should employ. Don't even wait  
12 until you get out. You could start today to make plans of how  
13 you're going to make a living, and how you're going to live  
14 that out in concrete fashion.

15 So thanks to all who came here today, for your taking  
16 the time to write letters, I appreciate that as well. You may  
17 be disappointed, you may have been hoping for a lower sentence,  
18 I don't know. I call them the way I see here. But hopefully  
19 you're sitting here and thinking the system was fair and was  
20 thoughtful and wasn't mean spirited or petty in any way. If  
21 that was the case it would diminish everyone's respect for the  
22 system and wouldn't be a good thing.

23 All right, so thanks to the marshal and thanks to the  
24 court reporter and I wish everybody a good day.

25 (Adjourned)